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No. 90-1357

In The

Supreme Court of the United States

October Term, 1990

3550 STEVENS CREEK ASSOCIATES,

Petitioner,

v.

BARCLAYS BANK OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a private party may recover its response costs under Section 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2)(B), for the voluntary removal of fireproofing and insulation containing asbestos from a commercial building.

2. Whether the installation of fireproofing and insulation containing asbestos during construction of a commercial building constitutes a "disposal" of hazardous waste under Section 107(a)(2)(B).

RULE 29.1 LIST

Respondent Barclays Bank of California was acquired by Wells Fargo Bank, N.A., effective June 1, 1988. Wells Fargo Bank, N.A. is wholly owned by Wells Fargo and Company, a Delaware corporation. Wells Fargo Bank, N.A. has no subsidiaries or affiliates to list pursuant to Rule 29.1. Wells Fargo and Company's subsidiaries are wholly owned except for Wells Fargo Nikko Investment Advisors.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Barclays Bank of California ("Barclays") respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 915 F.2d 1355 (1990).

STATEMENT OF THE CASE

In 1963 or 1964, First Valley Corporation completed construction of an office building located at 3550 Stevens

Creek Boulevard in San Jose, California ("the building"). Building materials used in construction included asbestos insulation and fire-retardant materials containing asbestos. In 1969 Barclays purchased the assets of First Valley Bank which assets included First Valley Bank's wholly owned subsidiary First Valley Corporation. First Valley Corporation was dissolved in 1971 at which time Barclays took title to the building. Petitioner 3550 Stevens Creek Associates ("Stevens Creek") acquired the property from Barclays in April 1984. Sometime thereafter Stevens Creek renovated the building and voluntarily commenced removal of the asbestos which had been installed over 20 years earlier when the building was constructed.

In this action Stevens Creek attempted to shift the cost of asbestos removal to Barclays pursuant to Section 107(a)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The District Court dismissed Stevens Creek's complaint noting that Barclays "did not dispose of hazardous waste material" and thus "the provisions of CERCLA do not provide for the recovery of costs in this situation." *See* Appendix to Stevens Creek's Petition ("App.") at page 34.

On appeal the Ninth Circuit affirmed the dismissal because the asbestos complained of had been installed as a building material and not disposed of within the meaning of Section 107(a)(2). App. 16. The Ninth Circuit also concluded that even apart from the disposal requirement "there was no basis for inferring Congress' intent to create such a far-reaching private cause of action under Section 107(a)." App. 21.

REASONS FOR DENYING THE WRIT

1. There Is No Conflict In Decisions Or Any Important Federal Question To Review.

Stevens Creek's Petition describes no new issues but merely resurrects arguments rejected by the District Court and the Court of Appeals. Stevens Creek also asserts the existence of a conflict among the federal courts where there is none.

Every federal court which has had occasion to consider whether a private party may recover its response costs under Section 107(a) for removal of asbestos containing building materials has concluded that CERCLA does not provide such a remedy. *See First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 867-69 (4th Cir. 1989), *cert. den.*, ___ U.S. ___, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990); *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059 (5th Cir. 1990); *Anthony v. Blech*, ___ F.Supp. ___, 1991 U.S. Dist. LEXIS 4226 (C.D. Cal. 1991); *Retirement Community Developers, Inc. v. Merine*, 713 F.Supp. 153, 156-58 (D. Md. 1989); *Prudential Insurance Company of America v. United States Gypsum*, 711 F.Supp. 1244, 1251 (D. N.J. 1989); and *Corporation of Mercer University v. National Gypsum Co.*, 24 Envt. Rep. Cas. (BNA) 1953 (N.D.Ga. 1986).[1]

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[1] Stevens Creek attempts to fabricate a conflict among the federal courts by reference to the decision of the Eleventh Circuit in *United States v. Fleet Factors Corporation*, 901 F.2d

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Stevens Creek falsely represents that the Court of Appeals disregarded pertinent interpretations of CERCLA by the Environmental Protection Agency ("EPA"). At oral argument before the Court of Appeals, counsel representing the United States as Amicus Curiae stated that the EPA had formulated no interpretation, official or otherwise, of Section 107(a) as it applies to the removal of asbestos from the structure of a commercial building. App. 23-24, n. 19. The EPA expressed no position on the central issue before the Ninth Circuit – Stevens Creek's ability to state a claim under Section 107(a) for removal of asbestos from a commercial building.

The Court of Appeals' decision is plainly correct, is in accord with all other courts and presents no issue of substance for this Court. Shorn of its plumage, Stevens Creek's petition merely restates arguments already rejected by all other federal courts.

A. The Disposal Requirement.

For Barclays to be liable under Section 107(a)(2)(B) Stevens Creek must establish a "release" or "threatened

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1550, reh. den., 911 F.2d 742 (11th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 752 (1991). The issue here, whether or not CERCLA provides a cause of action for asbestos removal from commercial buildings, was not even discussed in that case. One can only assume that the oblique reference to asbestos in the opinion relates to its disposal as waste rather than its use as a building material. *See, Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 87-88 (3rd Cir. 1988), *cert. den.*, 488 U.S. 1029, 109, S.Ct. 837, 102 L.Ed.2d 969 (1989); *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1145 (D. Ariz. 1984).

release" of a hazardous substance, and that Barclays is a person "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." The Ninth Circuit based its holding, in large part, on the fact that Barclays had not "disposed" of the asbestos within the meaning of the above cited section. Before reaching its conclusion that no disposal occurred, the Ninth Circuit reviewed the plain language of CERCLA beginning with its definition of terms. Section 101(29) defines disposal as having the same meaning as that attributed to disposal under the Solid Waste Disposal Act. The Solid Waste Disposal Act ("SWDA") defines disposal as solid waste or hazardous waste. 42 U.S.C. § 6903(3) and (5). The SWDA defines solid waste as "any garbage, refuse, sludge, . . . and other discarded material. . . . " 42 U.S.C. § 6903(27). The SWDA defines hazardous waste as a subset of solid waste. 42 U.S.C. § 6903(5). Regulations issued by the EPA define solid waste as "any discarded material" which is "abandoned, . . . recycled, . . . or inherently waste-like." 40 C.F.R. § 261.2(e)(1)(i). With these statutory definitions in mind the Ninth Circuit thus observed:

> "On its face 'disposal' pertains to 'solid waste or hazardous waste', not to building materials which are neither. There is no suggestion that Barclays or its predecessors in interest discarded asbestos insulation and fire retardants; rather they were used to construct the building." App. at 16.

The Ninth Circuit's interpretation of the disposal requirement as referring only to an affirmative act of

discarding a substance as waste, and not to the productive use of the substance, is in accord with all other federal courts which have construed the disposal requirement. *See Prudential Insurance Company of America v. United States Gypsum, supra,* 711 F.Supp. at 1253-56; *Jersey City Redevelopment Authority v. PPG Industries,* 655 F.Supp. 1257, 1260-61 (D.C.N.J. 1987), aff'd., 866 F.2d 1411 (3rd Cir. 1988); *Edward Hines Lumber Company v. Vulcan Materials Co.,* 685 F.Supp. 651, 654 (N.D. Ill. 1988), aff'd., 861 F.2d 155 (7th Cir. 1988); *United States v. Westinghouse Electric Corp.,* 22 Envt. Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).[2]

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[2] Without regard to the disposal requirement, Stevens Creek's CERCLA claim also fails as a matter of law because there has been no release or threatened release of asbestos into the "environment." Section 101(8), 42 U.S.C. § 9601(8). Courts considering this language have concluded that the "environment" referred to does not include air within a building. The escape of asbestos fibers within a building thus falls outside the intended objectives of CERCLA. *See First United Methodist Church of Hyattsville v. United States Gypsum Co., supra,* 882 F.2d at 867 n.5; *Covalt v. Carey Canada, Inc.,* 860 F.2d 1434, 1436-1437 (7th Cir. 1988).

CONCLUSION

For the reasons set forth above, it is submitted that the petition for certiorari be denied.

DATED: April 18, 1991

Respectfully submitted,

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